

15 Eat0wals

15 Sentence

16 UNITED STATES DISTRICT COURT
17 SOUTHERN DISTRICT OF NEW YORK
18 -----x

19 UNITED STATES OF AMERICA,

20 v.

20 09 CR 722

21 STEPHEN WALSH,

22 Defendant.

23 -----x

24 New York, N.Y.
25 October 29, 2014
11:30 A.M.

10 Before:

11 HON. MIRIAM GOLDMAN CEDARBAUM,

12 District Judge

13 APPEARANCES

14
15 PREET BHARARA
16 United States Attorney for the
17 Southern District of New York
18 BENJAMIN NAFTALIS
19 JESSICA MASELLA
20 Assistant United States Attorneys21 SHER TREMONTE, LLP
22 BY: MICHAEL TREMONTE
23 JUSTIN SHER
24 Attorneys for Defendant

25 Present: Special Agent Michael Braconi

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1 (In open court; defendant present)

2 THE DEPUTY CLERK: All rise.

3 THE COURT: Good morning. Please be seated.

4 All right, Mr. Walsh, have you read the presentence
5 report?

6 THE DEFENDANT: Yes, your Honor.

7 THE COURT: Are there any errors you would like to
8 draw to my attention.

9 THE DEFENDANT: Nothing, your Honor.

10 THE COURT: Very well.

11 Then I will hear anything you would like to tell me,
12 and anything your lawyer would like to tell me, in connection
13 with sentence.

14 MR. TREMONTE: Good morning, your Honor.

15 THE COURT: Good morning.

16 MR. TREMONTE: Michael Tremonte, for Mr. Walsh.

17 Steven Walsh, seated beside me today, is a changed man
18 from the person who first appeared before this Court now almost
19 five years ago.

20 First, Mr. Walsh has accepted responsibility for his
21 crime. He entered a guilty plea. And he admitted,
22 specifically, that he signed the promissory notes which were
23 issued to, and carried on the books of WGTC, that the books of
24 WGTC were misstated as a result, and that that worked a deceit
25 on investors.

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1 And in addition to pleading guilty to this case,
2 Mr. Walsh has also resolved the CFTC and SEC actions against
3 him.

4 Second, and very importantly on a personal note, Mr.
5 Walsh has successfully confronted his alcoholism. Since
6 college, Mr. Walsh has had a decades-long dependence on
7 alcohol. At his daughters urging in early 2013, post
8 indictment, Mr. Walsh joined Alcoholics Anonymous. He has been
9 sober for nearly two years, and has devoted substantial time in
10 that period to helping others through AA, including through the
11 Rikers Alcoholics Anonymous ministry, as described in our
12 sentencing submission.

13 Now, these developments have changed Mr. Walsh's life
14 for the better. Nevertheless, he profoundly regrets his
15 involvement in the securities fraud in this case. And he
16 profoundly regrets that his career, which for many years was
17 exemplary, will end with his conviction.

18 From the time of his graduation from college and his
19 first job on Wall Street in the sixties, Mr. Walsh loved his
20 work. He was good at it. He was recognized for his talents.
21 And he spent decades improving his skills, building businesses,
22 and generating returns for investors.

23 In addition to those accomplishments, Mr. Walsh was,
24 and still is, a devoted father. He doted on his sons and
25 daughter growing up, supported them with his care, his

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1 attention when they were children. Was a constant presence
2 through adolescence, and now supports them as adults with
3 careers and families of their own.

4 As discussed in our submission, and in the more than
5 60 supporting letters that were addressed to the Court, Mr.
6 Walsh has also been a staunch supporter of a range of
7 charitable causes. His efforts on behalf of North Shore Long
8 Island Jewish hospital, the US Lacrosse Foundation, and
9 University of Buffalo, demonstrates a true sustained commitment
10 to important civic institutions that serve the public good.

11 And his role in the founding and growth of the Long
12 Island Alzheimer's Foundation is extraordinary. That
13 organization, founded in 1988 after Mr. Walsh's then
14 father-in-law died of the disease, continues to improve the
15 lives of many, to this day.

16 These considerable accomplishments, and his work with
17 his family and for his community, demonstrate the true nature
18 of Mr. Walsh. These accomplishments combined with his
19 acknowledgment of wrongdoing, and his acceptance of
20 responsibility, speak volumes about his true character.

21 And we submit the evidence of Mr. Walsh's strong
22 character, all of the good things that he has done for his
23 family, for his community, year in and year out, these things
24 should weigh strongly in favor of leniency.

25 These considerations also should weigh strongly

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1 against the Draconian sentence sought by the government. The
2 government, in its submission, seeks a sentence of 240 months,
3 which would ensure, for all practical purposes, that Mr. Walsh
4 ends his life in prison. Such a sentence, your Honor, in our
5 view, or anything even remotely close, would plainly be
6 excessive.

7 THE COURT: Over how many years did Mr. Walsh engage
8 in this scheme of stealing other people's money?

9 MR. TREMONTE: Your Honor, Mr. Walsh allocuted to
10 securities fraud that took place during a period between 1996
11 and 2009. And, specifically, the allocution and the principle
12 evidence in this case relates to these promissory notes. And
13 these promissory notes were submitted at the urging of Mr.
14 Walsh's co-defendant, for the reasons that are spelled out in
15 the government's submission. But, I submit, your Honor, that
16 the duration of the misconduct in this case needs to be kept in
17 perspective. And I'll talk about that in just a little bit.

18 THE COURT: You know, even though Mr. Walsh pleaded
19 guilty in this case, ultimately after years of avoiding it, it
20 was -- as a result of that, I heard all of the evidence before
21 the plea was entered in a Monsanto hearing. So I am very
22 familiar with the facts of this case.

23 MR. TREMONTE: Your Honor, if I may respond to that.
24 Two things:

25 First, I would urge the Court to keep in perspective

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1 the amount of time that has passed. I think, as your Honor
2 knows, my firm came into this case quite late in the day.

3 THE COURT: Absolutely.

4 MR. TREMONTE: After the Monsanto hearing.

5 THE COURT: Absolutely.

6 MR. TREMONTE: And we worked very, very hard to make
7 sure that we had all of the evidence which, as the Court may
8 remember, it was very difficult to get from predecessor
9 counsel. But we eventually got it from the government. We
10 made an effort to get through all of it, to understand the case
11 backwards --

12 THE COURT: There was a transcript.

13 MR. TREMONTE: Yes. And we are very familiar with the
14 Monsanto hearing transcript. And I think, fairly viewed, a lot
15 of that time that passed was not about Mr. Walsh, really, you
16 know, as a product of his own strategic decisionmaking
17 resisting resolution of the case but, really, legal wrangling
18 which protracted the proceedings over an extraordinarily long
19 period of time. But I would urge the Court not to hold Mr.
20 Walsh ultimately responsible for, what strikes me looking at it
21 with the benefit of hindsight, is a good deal of legal
22 wrangling. But the Monsanto transcript, I think, is really key
23 here.

24 At that hearing, the government presented the better
25 part of its case through FBI Special Agent Barnacle. And I

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1 think a lot of that evidence, which we discussed at length in
2 our sentencing submission, is important to keeping this case in
3 perspective. Because I think the government extrapolates, from
4 that evidence, at least in its most recent submission, in a way
5 that is not quite fair, right.

6 The evidence that came out at the sentencing hearing,
7 again as we discuss at length in our memo, shows that Mr. Walsh
8 had a very different, and ultimately limited, role than his
9 co-defendant, Mr. Greenwood.

10 During the entirety of the relevant period, Mr. Walsh
11 was in a completely separate -- not just a different office, he
12 was in a different state. The testimony that was elicited from
13 Special Agent Barnacle --

14 THE COURT: Are you suggesting that he was unaware of
15 the representations that were made to investors?

16 MR. TREMONTE: No, your Honor, I'm not. I'm not. But
17 it is important that evidence was elicited which made it very,
18 very clear that during the relevant period, Mr. Walsh did not
19 make presentations to the investors. In fact, had virtually no
20 interactions with investors, whatsoever. Played no role in
21 masterminding the fraud. Had no role in managing the books and
22 records of the business. Didn't prepare statements.

23 THE COURT: But he certainly had no trouble spending
24 the profits.

25 MR. TREMONTE: And, again, I think the Monsanto

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1 testimony was very important. Because, ultimately, what the
2 sentencing process is about, under 3553(a), is drawing
3 distinctions, both large distinctions between this case and
4 other cases. Also distinctions between the relative
5 culpability of defendants. And then focusing, as courts have
6 discussed over and over again, on the particular nature and
7 characteristics of the individual defendant.

8 And I think the clear take-away from that Monsanto
9 hearing testimony is that if we, as we must, think about Mr.
10 Walsh in terms of relative culpability, okay --

11 THE COURT: Why is that, why is not very culpable
12 enough, even if someone else is more?

13 MR. TREMONTE: Very culpable is clearly enough for
14 some kind of sentence. But in terms of fashioning the
15 appropriate sentence, it is important to make these fine
16 distinctions. The other important --

17 THE COURT: That someone was worse, is not an excuse.

18 MR. TREMONTE: It is not an excuse. And in no way,
19 whatsoever, is it our intention to excuse Mr. Walsh's conduct
20 but, rather, to call to the attention of the Court the facts
21 and circumstances to distinguish him from his co-defendant, and
22 to distinguish this case from the most egregious and predatory
23 financial frauds, which it was not. And we go into this in
24 great detail in our sentencing submission. In particular, we
25 spent a fair amount of effort on the issue of the over

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1 statement of culpability under the fraud guidelines in 2B1.1.

2 And we cited to --

3 THE COURT: Well, lying is related to fraud, clearly.

4 MR. TREMONTE: And, again --

5 THE COURT: And using other people's money which one
6 acquires through misrepresentation is also fraud.

7 MR. TREMONTE: And, your Honor, again, none of this is
8 to minimize the defendant's conduct. It really is not. But to
9 put that conduct in perspective, so that the sentence
10 ultimately reflects, appropriately, the nature of the offense.

11 And as we point out, and as even the Sentencing
12 Commission has emphasized, those fraud guidelines are a very
13 clumsy and irrational mechanism for establishing the length of
14 sentence. And, really, the government here makes no meaningful
15 attempt to contest that in their submission. In fact the
16 government makes no attempt to justify its request for a
17 guidelines sentence that is driven, really, a hundred percent
18 by that loss amount table, where other courts routinely, in
19 this district and elsewhere, routinely set that guideline aside
20 and impose much lower sentences. Even in cases where
21 defendants acted with far greater culpability and with much
22 greater destructive consequences.

23 The other thing that is very clear from the Monsanto
24 hearing and, also, from the very robust record in the SEC
25 proceeding, is that 99 percent, or 98.9 percent of all of the

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1 principle invested in this case either has already been, or
2 will be, returned to the investors. And that makes this case
3 completely extraordinary. By the time the receiver completes
4 his work, almost all of the \$950 million that was invested over
5 the course of the period in the indictment will have gone back
6 to those financial institutions that made the investments in
7 the first place. This is extremely unusual. I have been doing
8 this for a while, both on this side and as a prosecutor. And I
9 can say I have never been involved in a case like this. I have
10 never been involved in a securities fraud case where 99 percent
11 of the investors' principle was returned.

12 That matters greatly. It matters, because the
13 sentencing process is, as I said, is ultimately an exercise in
14 comparison in determining where one case falls in comparison to
15 others. Is the defendant's wrongdoing extreme, did he cause
16 devastating harm. And that's not what happened here. In
17 contrast to the most egregious cases --

18 THE COURT: Right, but what you are not -- you are not
19 telling me that Mr. Walsh was responsible for the return.

20 MR. TREMONTE: The reason why that money is going back
21 to the investors is precisely because this defendant is not the
22 kind of defendant that you see in a Ponzi scheme or a
23 Pump-and-Dump scheme. The degree of criminality here is not
24 even close. And there is powerful evidence of that. All that
25 money is coming back to investors, because it was actually

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3 invested in real viable assets.

4 THE COURT: For the benefit of the people whose money
5 it was not.6 MR. TREMONTE: Hundreds of millions of dollars at the
7 time that this case was taken down in 2009 was actually
8 invested precisely --

9 THE COURT: I don't want to slow you up, go ahead.

10 MR. TREMONTE: Where it not for the dollar amount at
11 issue, the case would definitely not have received this kind of
12 attention, and the government would not be seeking an obviously
13 disproportionate sentence. That is an overarching point. And
14 if the numbers were not so big, and the fraud guidelines didn't
15 pose such a distraction, it would be easier to focus on
16 3553(a) factors. Sentencing supposed to --17 THE COURT: That's what I look to first. In every
18 case in which I impose sentence, I look first to the factors
19 under the sentencing section of the statute.

20 MR. TREMONTE: I'm sure that's right, Judge.

21 THE COURT: I very rarely apply the guidelines.

22 MR. TREMONTE: And that makes sense here, because
23 faithfully applying --

24 THE COURT: But this is not such a case.

25 MR. TREMONTE: Faithfully applying the 3553(a) factors
in this case, Mr. Walsh should not be sentenced as if he were
operating a Ponzi scheme.

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1 THE COURT: Why is that?

2 MR. TREMONTE: Because it was not a Ponzi scheme. It
3 is a completely different level of criminality when the
4 defendant begins, from the very outset, to defraud victims.
5 And that is not what happened here. That is not what the
6 evidence shows.

7 Mr. Walsh has been involved in legitimate businesses
8 since the late sixties. And the evidence shows that even WGTI
9 and WGTC, the entities at issue here, were set up as legitimate
10 investments. And you know that. You know that because
11 hundreds of millions of dollars were actually in precisely the
12 investment vehicle that was advertised. What really happened
13 here? What really happened here is that narrow category of
14 cases where everything starts with the best of intentions and
15 as a completely legitimate exercise and, for whatever reason,
16 because the market cuts against the investments, because some
17 kind of expected return didn't materialize, mistakes are made
18 and those mistakes were repeated. Again, not to minimize it.
19 It is a crime. And Mr. Walsh has admitted to that. But it's
20 not like a bucket shop. It is not like a Ponzi scheme. It was
21 not conceived in fraud. And that does make it different. And
22 that does mean that the guidelines that would otherwise be
23 applicable, to the absolute worst cases, right, should not be
24 applied mechanically here, that would necessarily produce an
25 unjust result.

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1 THE COURT: Nothing should ever be applied
2 mechanically.

3 MR. TREMONTE: And I completely agree, your Honor, and
4 for the reasons we stated.

5 And so the nature of the business, the reason why
6 things went sideways, and also other factors that we have
7 discussed, such as the relevant culpability of Mr. Walsh, are
8 critically important here.

9 And we also urge the Court to take into account Mr.
10 Walsh's personal history and circumstances. In particular, as
11 I said, his extraordinary dedication to his family, his friends
12 and his community. The over 60 letters that were submitted by
13 people who know Mr. Walsh best, in some cases up to 50 years,
14 attest to the strength of his character and his deep concern
15 for others.

16 The letter from Michael Gann, who has known Mr. Walsh
17 for over 20 years, is typical, your Honor. Mr. Gann describes
18 the tremendous support that Mr. Walsh provided to his father
19 who was suffering from cancer, and whose wife had just also
20 been diagnosed with cancer. Mr. Gann writes all through the
21 ins and outs of the hospital with my mom, there was Steven,
22 stopping by the hospital, calling my dad, taking him out,
23 keeping him busy during a difficult time. And Mr. Gann goes on
24 to say that Mr. Walsh, quote, "never left their side through
25 all of the pain.

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1 Time and again, Mr. Walsh has been there for his
2 friends and family in times of need. And, your Honor, you see
3 this in letter after letter, where supporters recount, in
4 detail, how Mr. Walsh has shown them many acts of kindness. To
5 them. To their families. And to strangers.

6 Mr. Walsh has also been there for his community, as I
7 said, spending countless hours encouraging others to support
8 worthy causes. I note in particular the letters concerning Mr.
9 Wales support for Long Island Alzheimer's Foundation, which
10 describe how his efforts really were not just about
11 fundraising, although he certainly encouraged many, many people
12 to provide lots of financial support, but they include speaking
13 in public about the need to support the foundation. Visiting
14 with Alzheimer's patients, year in and year out. And even
15 doing little things around the office, like cleaning up and
16 painting when the office needed maintenance.

17 And I would point, in particular, also, your Honor, to
18 the letters submitted by law enforcement officials on behalf of
19 Mr. Walsh. Robert Hughes, Janice Collins, a probation officer.
20 And Mr. Balboni, who was a very high ranking law enforcement
21 official in New York State, it's the only time he has ever
22 submitted a letter on behalf of a defendant to be sentenced,
23 even though he has been asked to do so many, many times over
24 the years.

25 We urge the Court to take into consideration all of

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1 this powerful evidence of Mr. Walsh's admirable qualities as
2 demonstrated in these letters, which argue in favor of
3 leniency. Again, the government insists the lengthy sentence
4 is necessary to meet the goal of general deterrence. We
5 disagree. Research indicates that lengthy sentences have no
6 impact on general deterrence in this kind of case. We cite in
7 particular to U.S. v. Adelson, a decision by Judge Rakoff 441
8 F.Supp.2nd 506, in which the judge discusses how there really
9 is no measurable effect on general deterrence of sentences of
10 any length in cases like this. Ultimately, there is little, if
11 any, evidence that incarceration will effect general
12 deterrence. Whereas, here, the defendant has no criminal
13 history, was engaged in lawful pursuits and real businesses for
14 the majority of his adult life, where his personal history and
15 characteristics demonstrate a powerful connection to his family
16 and dedication to his community, and where the fraud was
17 principally one of misrepresentation and not predatory, and
18 where there is zero chance of recidivism.

19 A lengthy sentence, your Honor, is not necessary, on
20 the particular facts of this case. It's not necessary, given
21 the particular history and circumstances of Mr. Walsh. On the
22 contrary, for all of the reasons discussed in our memo, a short
23 sentence will be adequate to meet the goals of sentencing under
24 3553(a).

25 Mr. Walsh would like to address the Court, your

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1 Honor.

2 THE COURT: Very well.

3 THE DEFENDANT: Your Honor, I am deeply sorry and
4 apologize to the Court. I totally accept my responsibility for
5 my role in what happened. I want to apologize to our investors
6 who placed their trust in me, for the harm they experienced
7 because of my actions. I truly loved working in finance and
8 investments, and I want to apologize to all of the people who
9 trained me and mentored me during my career. And to every
10 single person that I trained and mentored who believed in, and
11 supported, and trusted me. I want to apologize to them all. I
12 have let each of them down and I'm truly sorry.13 Lastly, I would like to apologize to my family and my
14 very good friends, particularly my three children, Michael,
15 Andrew, and Sarah, who are here. Their support and
16 unconditional love have been amazing through this. And I know
17 that I put them through a tremendous amount of pain.18 I cannot thank them enough for their unconditional
19 support.

20 Thank you, your Honor.

21 THE COURT: I assume the government has nothing to
22 add?

23 MR. NAFTALIS: No, your Honor. We rest on our papers.

24 THE COURT: Okay. I do intend to follow the
25 recommendations of the probation department in the case.

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1 I heard the evidence in the Monsanto hearing. And I
2 know that the proceeds of this scheme were used by both Mr.
3 Walsh and his co-defendant for personal extravagance and high
4 living, whatever their mental state, at the same time that they
5 were taking money from other people under false pretenses.

6 Indeed, many of the issues that were brought before me
7 had to do with extravagant expenditures, and whether the
8 property that was received for those expenditures could be made
9 available for Mr. Walsh's personal use to pay his lawyers.

10 Now, as I said, I do follow the recommendations of the
11 probation department. And, at this time, I sentence you in
12 accordance with the guidelines, to 20 years in prison. To be
13 followed by three years of supervised release.

14 I have received a consent order of forfeiture from the
15 government, which I have signed. But I have not received
16 information on restitution.

17 MR. NAFTALIS: Your Honor, the government in
18 consultation with the defense, will submit something following
19 sentence as to restitution.

20 THE COURT: Very well.

21 In any event, Mr. Walsh, what happened here was that
22 many, many people had their money, in effect, stolen by
23 misrepresentation as to what they would receive in exchange for
24 their money. And that money was used to line your pockets and
25 the pockets of your co-defendant. And you certainly did not

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1 set aside some particular percentage of that profit for the
2 benefit of anyone else. I mean some of it, I suppose, you gave
3 to charity as your lawyer has pointed out. But you also spent
4 lavishly for yourself. And used the proceeds of your
5 investments, which were not the investments promised to those
6 that you got to give you the money, for your own enrichment and
7 not for anybody else.

8 Accordingly --

9 I think you should get up.

10 -- at this time, I sentence you to 20 years in prison
11 to be followed by three years of supervised release.

12 I take it the probation department doesn't think that
13 you will have -- oh, I do have to impose a special assessment
14 under the law, as well.

15 MR. NAFTALIS: Your Honor, the special assessment
16 would be \$100.

17 THE COURT: Very well. There is a special assessment
18 of \$100.

19 At the recommendation of the probation department, I
20 will not impose a fine because there has been an order of
21 forfeiture signed. And there will be restitution.

22 I do hope that you will try to focus on never again
23 doing anything resembling this scheme that you were engaged in.
24 And you will take the time, while you are in prison, to think
25 about whether this is something you really can claim pride in

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1 in any way, as your lawyer would like me to believe. I hope
2 you do realize the gravity of what you have done, and that you
3 think about that during your time in prison. And if you -- and
4 if you do, I wish you good luck.

5 THE DEFENDANT: Thank you, your Honor.

6 THE COURT: I don't think minimizing what happened
7 here is a particularly good way of looking at it. Because lots
8 of people lost lots of money. Some of it eventually may
9 trickle back to them, as was pointed out. But that does not
10 justify using, for your own benefit and for many frivolous
11 things, the money that you stole from other people. I hope you
12 really will focus on that when you have quiet time to think.
13 And if you are willing to really search your soul about what
14 happened here, I wish you good luck.

15 Very well.

16 Is there anything further?

17 MR. NAFTALIS: Yes.

18 THE COURT: You have the right to appeal. And within
19 the next 10 days, you should tell your lawyer whether you want
20 to appeal my sentence. Because he has to file a notice of
21 appeal in your behalf.

22 So that's something you should think seriously about,
23 and discuss with your lawyer.

24 Is there anything further?

25 MR. NAFTALIS: Just a few items, your Honor.

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1 I think it is implicit in the Court's statements that
2 your Honor has considered the 3553(a) factors --

3 THE COURT: Of course I have.

4 MR. NAFTALIS: -- in fashioning its sentence.

5 THE COURT: Of course I have. Those are very
6 important factors in connection with every sentence I do.

7 And I do not always find that the guidelines sentence
8 adequately reflects what those factors provide, but in this
9 case, I am satisfied, after careful thought, that the
10 guidelines are an appropriate sentence.

11 MR. NAFTALIS: And with respect to the advisory
12 guidelines range, just so I'm clear, the Court has adopted, in
13 its entirety, the PSR, including --

14 THE COURT: That is correct.

15 MR. NAFTALIS: -- the guidelines calculation at 42 --

16 THE COURT: That is correct.

17 MR. NAFTALIS: -- and criminal history category I; is
18 that correct?

19 THE COURT: That is correct.

20 MR. NAFTALIS: And lastly, your Honor, just with
21 respect to the PSR, I would just ask that your Honor ask
22 counsel if he has reviewed the PSR, and has discussed it with
23 his client.

24 THE COURT: And whether he has any errors to bring to
25 my attention. That's fair enough, yes.

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1 Is there any misstatement of fact in the guidelines --
2 in the presentence report?

3 MR. TREMONTE: Your Honor, we submitted, to probation,
4 a detailed letter --

5 THE COURT: Good.

6 MR. TREMONTE: -- specifying the parts of the
7 presentence report that were factually inaccurate. Those
8 included -- I believe they were all adopted by probation and --

9 THE COURT: That is correct. They filed a revised
10 report.

11 MR. TREMONTE: Correct.

12 Including a description of the events in which Mr.
13 Walsh's role had diminished in the business, even prior to the
14 period covered in the indictment.

15 Your Honor, may I have one moment to confer with my
16 client?

17 THE COURT: Yes, of course.

18 MR. TREMONTE: Thank you.

19 THE COURT: You may both be seated.

20 MR. TREMONTE: Your Honor, may I be heard?

21 THE COURT: Very well.

22 MR. TREMONTE: I understand from your Honor's remarks
23 that it's the Court's understanding that the sentence in the
24 case is appealable. Under the terms of the plea agreement --

25 THE COURT: Oh, thank you. I had forgotten. Some of

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1 our plea agreements do, and some don't waive the right of
2 appeal.

3 MR. TREMONTE: I think it's totally clear, but not
4 crystal clear. And to be on the safe side --

5 THE COURT: Let's look at the plea agreement.

6 MR. TREMONTE: I believe it is page 4 of the plea
7 agreement, your Honor, second full paragraph.

8 THE COURT: Yes. I should have remembered that the
9 government really tries very hard to get that provision.

10 MR. TREMONTE: As it was --

11 THE COURT: Perhaps you can read me the sentence you
12 are talking about.

13 MR. TREMONTE: Yeah, your Honor.

14 I believe the relevant sentence is in the second full
15 paragraph, on page 4, as follows: The defendant acknowledges
16 that his entry of a guilty plea to the charged offense
17 authorizes the sentencing court to impose any sentence up to
18 and including the statutory maximum of 240 months imprisonment.

19 I'm sorry, the last sentence: Moreover, it is
20 understood that the defendant will have no right to withdraw
21 his guilty plea, should the sentence imposed by the Court be
22 other than the stipulated guidelines sentence of 240 months.

23 And then, lower, the third full paragraph: It's
24 agreed the defendant will not file a direct appeal, nor bring a
25 collateral challenge of any sentence equal to or below the

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1 stipulated guidelines sentence of 240 months.

2 I don't have the benefit of a Westlaw terminal at the
3 moment. I'm not sure if 240 months, plus the supervised
4 release recommended by probation, is enough to get us over it.

5 To be on the safe side, we respectfully request that
6 the Court impose a sentence of 240 months and one day, so that
7 in the event the client decides to appeal, they can.

8 THE COURT: Well, if you are asking me to set aside a
9 provision of the plea agreement.

10 MR. TREMONTE: And I am not, your Honor. I'm
11 asking --

12 THE COURT: That is, your client had the right of
13 appeal before he agreed to this language, of which he did not
14 have to agree to.

15 MR. TREMONTE: He did not, your Honor. And certainly
16 it was.

17 THE COURT: What do you mean, "he did not."

18 MR. TREMONTE: No, that's right.

19 THE COURT: He didn't discuss it with --

20 MR. TREMONTE: No, I'm agreeing, your Honor.

21 THE COURT: Yes. And I think I explicitly asked him
22 if he discussed it with his lawyer.

23 MR. TREMONTE: You did, your Honor.

24 THE COURT: Because it is a major right.

25 MR. TREMONTE: You did, your Honor.

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1 And he answered in the affirmative. And that's
2 correct. I'm actually agreeing with the Court, I'm not
3 disagreeing.

4 However, it sounds as though the Court anticipated
5 that the defendant would have a right to appeal and, so, again,
6 we --

7 THE COURT: That's not correct. I did not. I simply
8 forgot for a moment. And at the time I took his plea, I made
9 it very clear to him that he was giving up that right. And he
10 told me he understood and he had discussed it with his lawyer.

11 MR. TREMONTE: Your Honor, there was a colloquy with
12 the magistrate, that's correct.

13 THE COURT: Okay. I told him -- oh, I'm sorry, it was
14 not my -- that's why I didn't remember. I always do. But I
15 didn't take that, this plea. To my regret. I do not often
16 permit the delegation of a plea.

17 MR. TREMONTE: Your Honor, again we reiterate our --

18 THE COURT: It is my regular practice. And I hope the
19 magistrate judge did the same, to make clear what an important
20 right that is, the right of appeal. And I have to assume that
21 if he discussed it with you, you made that clear, as well.

22 MR. TREMONTE: Yes. As the defendant allocuted before
23 the magistrate and, again, reiterated today, he did enter into
24 the plea voluntarily.

25 THE COURT: And with an understanding of what he was

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1 giving up.

2 MR. TREMONTE: He did, your Honor.

3 I am bound, however, by my duty of candor. I don't
4 think anyone really expected that we would be at the outer
5 range of the hypothetical guidelines sentence. And so, again,
6 I would respectfully request that the defendant at least have
7 an opportunity to appeal. It's really just a matter of one
8 additional day to the sentence.

9 THE COURT: But this was a negotiated plea.

10 MR. TREMONTE: It was, your Honor. There is no --
11 there is no denying that.

12 THE COURT: If you --

13 MR. TREMONTE: That is not what I'm trying to do.

14 THE COURT: I understand that's not your purpose.

15 MR. TREMONTE: It is not.

16 THE COURT: But you have a partner here on this
17 agreement. I cannot determine -- I cannot set aside a part of
18 the agreement for no reason.

19 MR. TREMONTE: I understand that, your Honor. But I
20 will reiterate. And, again, nothing in our written submission
21 and nothing that I have said today is intended to minimize, or
22 in any way mischaracterize what happened here. But I would
23 hazard that there is not another case, even remotely like it,
24 where a 20-year sentence has been imposed. And for that
25 reason, I think in the spirit of the agreement, the single day

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1 doesn't make a difference, and at least allows us the
2 opportunity --

3 THE COURT: Well, it makes the difference that you
4 want. You want it to remove the waiver of the right of appeal.

5 MR. NAFTALIS: Your Honor, may I have a moment with
6 counsel?

7 THE COURT: It is a difference. Why don't you come to
8 the bench -- or to each other.

9 (Pause)

10 THE COURT: This was a negotiated plea. It was long
11 and coming.

12 If your client wants to withdraw his plea, I will
13 consider that. But I don't know what you are -- you are not
14 asking for that. You are asking me to change an agreement.

15 MR. TREMONTE: Your Honor, we thank the Court for your
16 patience in giving us an opportunity to confer with the
17 government.

18 What we propose, your Honor, is a brief adjournment so
19 that we may do some research to determine whether or not the
20 best course, and the appropriate course, is to withdraw the
21 plea. The government has agreed to that adjournment, if the
22 Court will allow it. And it can be very brief. Just a matter
23 of days. That would be sufficient for us to determine the best
24 course here, your Honor.

25 THE COURT: I don't know why, OI don't understand why

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1 it was not foreseeable, in view of that agreement, that you
2 would not be able to appeal. That your client would not be
3 able to appeal. It's a very common provision of these plea
4 agreements. That doesn't mean I have a view as to whether you
5 should or shouldn't have agreed to it. That's a different
6 matter. But what you are now doing is trying to withdraw part
7 of the plea.

8 MR. TREMONTE: Actually, at the moment, we're not
9 trying to do anything. We simply want to ensure that we have
10 done adequate research to present the client with potential
11 options, and come back to the Court with a considered position.
12 And, again, the government has no objection to our doing so.

13 So, we strongly urge the Court to give us just a brief
14 adjournment to sort this out.

15 THE COURT: Let me understand, what is the status of
16 your client at this moment, is he in custody or out of custody?

17 MR. NAFTALIS: He is on bail, your Honor.

18 MR. TREMONTE: He is out of custody, your Honor.

19 THE COURT: So you're asking me to continue bail.

20 MR. TREMONTE: I think there is no objection from the
21 government.

22 MR. NAFTALIS: No objection to that, your Honor.

23 THE COURT: Very well.

24 MR. TREMONTE: Thank you, your Honor.

25 THE COURT: Is there any reason why I shouldn't give

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1 you a deadline?

2 MR. TREMONTE: No, your Honor.

3 THE COURT: All right. I will give you until next
4 Tuesday to do whatever you want to do.

5 MR. TREMONTE: Thank you, your Honor.

6 THE COURT: Very well.

7 MR. NAFTALIS: Your Honor, is that -- just for
8 scheduling, is that for us to reappear on Tuesday, or for
9 papers to be submitted.

10 THE COURT: Fair enough, fair enough.

11 You certainly have to make your position clear to
12 me --

13 MR. TREMONTE: Yes, your Honor, we will.

14 THE COURT: -- whether you are seeking to set aside
15 the agreement.

16 MR. TREMONTE: Yes, your Honor. We will do so in
17 advance of that date.

18 THE COURT: Very well.

19 MR. TREMONTE: Thank you, your Honor.

20 MR. NAFTALIS: Thank you, your Honor.

21 (Adjourned)

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